

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Ariel Courage	Team: Squad #6	CCRB Case #: 201604920	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 05/29/2016 2:10 AM	Location of Incident: The driveway of § 87(2)(b)	Precinct: 67	18 Mo. SOL 11/29/2017	EO SOL 11/29/2017	
Date/Time CV Reported Tue, 06/07/2016 1:36 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Tue, 06/07/2016 1:36 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM John Guerra	01562	940223	067 PCT
2. SGT Sean Claxton	01500	943092	067 PCT
3. POM Besnik Bojkovic	9214	954556	067 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Sean Claxton	Abuse: Sergeant Sean Claxton entered § 87(2)(b) in Brooklyn.	
B.SGT Sean Claxton	Force: Sergeant Sean Claxton used physical force against § 87(2)(b)	
C.POM Besnik Bojkovic	Force: Police Officer Besnik Bojkovic used physical force against § 87(2)(b)	
D.POM John Guerra	Force: Police Officer John Guerra used physical force against § 87(2)(b)	
E.SGT Sean Claxton	Discourtesy: Sergeant Sean Claxton spoke discourteously to § 87(2)(b)	

### Case Summary

On June 7, 2016, § 87(2)(b) filed this complaint with the CCRB online (BR 01).

On May 29, 2016, at approximately 2:10 a.m., § 87(2)(b) was standing in the driveway of his house, located at § 87(2)(b) in Brooklyn. § 87(2)(b) acknowledged that he was smoking a marijuana cigarette.

Three officers from the 67<sup>th</sup> Precinct, Sgt. Sean Claxton, PO Besnik Bojkovic, and PO John Guerra approached § 87(2)(b) and placed him under arrest for § 87(2)(b) (BR 02). In the course of arresting § 87(2)(b) Sgt. Claxton entered the curtilage of § 87(2)(b) (**Allegation A**). While handcuffing § 87(2)(b) Sgt. Claxton, PO Bojkovic, and PO Guerra brought § 87(2)(b) onto the ground (**Allegations B, C, and D**). PO Guerra punched § 87(2)(b) in his eye (**subsumed under Allegation D**). En route back to the 67<sup>th</sup> Precinct stationhouse, Sgt. Claxton told § 87(2)(b) “You think you’re a smartass. We’re going to throw the book at you.” (**Allegation E**)

There is no video footage of this incident.

### Mediation, Civil and Criminal Histories

- This case was not eligible for mediation due to § 87(2)(b)'s arrest.
- On July 14, 2016, a Notice of Claim request was submitted to the Comptroller’s office. The results will be added to the case file upon receipt (BR 03).
- § 87(2)(b) § 87(2)(c)

### Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by § 87(2)(b) (BR 05).
- Sgt. Claxton has been a member of the service for 9 years. There are 17 allegations against him stemming from six cases that occurred between 2009 and the present, the following of which were substantiated:
  - In CCRB case 201400940, allegations of a refusal to provide name/shield number, frisk, and stop were substantiated. The Board recommended Command Discipline A and the NYPD Penalty was Command Discipline B.
- PO Guerra has been a member of the service for 10 years. This is the first allegation against him.
- PO Bojkovic has been a member of the service for 3 years. There are three prior allegations against him stemming from two complaints that occurred in 2014 and 2015, none of which was substantiated.

### Findings and Recommendations

#### Explanation of Subject Officer Identification

- § 87(2)(b) described the officer who punched him as a white male, approximately 5’8” tall, with the heaviest build of all three officers at approximately 250 pounds, black hair, and a black goatee. Of the officers on scene, PO Guerra (BR 06) § 87(2)(b), most closely

matches the provided description. Although PO Guerra denied punching § 87(2)(b) this allegation has been pleaded against him.

**Allegation A – Abuse of Authority: Sergeant Sean Claxton entered § 87(2)(b) in Brooklyn.**

**Allegation B – Force: Sergeant Sean Claxton used physical force against § 87(2)(b)**

**Allegation C – Force: Police Officer Besnik Bojkovic used physical force against § 87(2)(b)**

**Allegation D – Force: Police Officer John Guerra used physical force against § 87(2)(b)**

It is not disputed that § 87(2)(b) was smoking a marijuana cigarette in the driveway in front of his home, and that the gate of § 87(2)(b)'s driveway was open (BR 20). It is not disputed that Sgt. Claxton, PO Bojkovic, and PO Guerra were driving past, observed § 87(2)(b) smoking marijuana in public, approached him and arrested him for § 87(2)(b). It is not disputed that § 87(2)(b) provided physical resistance to his arrest. It is also not disputed that officers used some level of physical force against § 87(2)(b) in the course of effecting his arrest. § 87(2)(g)

§ 87(2)(b) (BR 07 and 19) said that he was smoking a marijuana spliff at the far end of his driveway, or very close to his house, when he first saw the officers drive by. Because they were in an unmarked vehicle, § 87(2)(b) did not initially realize that they were police officers, and began walking towards the end of his driveway, where he planned to dispose of the roach of the marijuana spliff by tossing it into the street. The officers then reversed their vehicle until they were parallel with § 87(2)(b)'s driveway. By the time the officers stopped their vehicle, § 87(2)(b) was standing by the post of the gate to his driveway, which was completely open. § 87(2)(b) never crossed over onto the sidewalk. By this time § 87(2)(b)'s spliff was no longer lit, but he was still holding it in his hand.

From the vehicle, Sgt. Claxton asked, “Sir, are you smoking in public?” § 87(2)(b) countered that he was not in public, and was standing in his driveway. Sgt. Claxton, PO Bojkovic, and PO Guerra then exited their vehicle and stood on the sidewalk facing § 87(2)(b) who was still standing at the end of his driveway. Sgt. Claxton again asked § 87(2)(b) if he was smoking on public property and § 87(2)(b) again said that he was smoking on private property. Sgt. Claxton asked § 87(2)(b) if it would be legal for him to “wave a gun around,” provided he was doing it on his driveway. § 87(2)(b) told Sgt. Claxton that he did not understand what that had to do with anything. Sgt. Claxton then told § 87(2)(b) that he had smelled marijuana as he drove by.

Sgt. Claxton then instructed § 87(2)(b) to come out of the gate. § 87(2)(b) asked why. Sgt. Claxton did not respond, but ordered § 87(2)(b) to come out of the gate two further times. § 87(2)(b) refused to step out of the gate and held his arms in front of his body, crossed at the wrist, with his hands closed into fists and level with his groin, as he did not want the officers to think he was going to touch or attack them. § 87(2)(b) was unsure if he was still holding the marijuana spliff at this time.

Sgt. Claxton then grabbed § 87(2)(b) by the front of his t-shirt. § 87(2)(b) tried not to be pulled out of the gate by keeping his body stiff and holding his weight back so that Sgt. Claxton could not pull him forward. PO Guerra and PO Bojkovic then gripped § 87(2)(b) by both of his arms and began pulling him forward with Sgt. Claxton. Once § 87(2)(b) was pulled

forward enough that one of his feet stepped over the threshold of the driveway, one of the officers – § 87(2)(b) – could not tell which – stepped behind § 87(2)(b) and pushed him further onto the sidewalk. Sgt. Claxton, PO Guerra, and PO Bojkovic then pushed § 87(2)(b) back into the driveway and to the side until § 87(2)(b)'s back made contact with the left side of the open driveway gate. Sgt. Claxton, PO Guerra, and PO Bojkovic then brought § 87(2)(b) onto the ground on his left side. § 87(2)(b) sustained a bruise to his left shoulder from being brought to the ground. § 87(2)(b) caught his fall partially on his left hand, which caused pain.

§ 87(2)(b) then rotated onto his back. PO Guerra and PO Bojkovic was positioned on top of § 87(2)(b). Sgt. Claxton was standing above PO Guerra and PO Bojkovic, looking down at them. One of the officers – § 87(2)(b) – was not sure which – took out their handcuffs and placed one around § 87(2)(b)'s left wrist. § 87(2)(b) was not sure where his right hand was at the time, except that it was not in handcuffs.

§ 87(2)(b) then tilted his head backwards towards his house to see if his mother, who was asleep in the house, had woken up and was watching the incident. When § 87(2)(b) tilted his head back, PO Guerra punched § 87(2)(b) once on his right eye, resulting in a black eye. § 87(2)(b) raised his voice and said, “Wow. Wow. Really?” PO Guerra replied, “You were resisting arrest.” § 87(2)(b) was then handcuffed. § 87(2)(b) did not remember exactly how he was handcuffed, but thought that he was not fully handcuffed until he was lifted to stand from the ground.

§ 87(2)(b) did not seek medical attention while in police custody because he did not want to delay his arrest processing. § 87(2)(b) also did not seek medical attention once he was released from police custody, but did take pictures of the bruise to his eye (BR 08) and to his left shoulder (BR 09). A slight bruise and swelling to this eye is depicted in § 87(2)(b)'s arrest photograph (BR 10).

§ 87(2)(b) said that his mother did not awake during this incident and did not witness it. § 87(2)(b) did not think there were any other witnesses in the area, given the late hour and that he lives in a primarily residential area.

Sgt. Claxton (BR 11) said that he was seated in the front passenger seat of the police vehicle. PO Bojkovic was driving the vehicle on East 89<sup>th</sup> Street at a slow rate of speed, or about 10 miles per hour, when they first saw § 87(2)(b). The windows of the vehicle were open, and Sgt. Claxton smelled marijuana. § 87(2)(b) was standing at the end of his driveway, approximately five inches from the sidewalk, when Sgt. Claxton first saw him. The gate of the driveway was completely open. § 87(2)(b) was smoking; based upon the odor of marijuana, Sgt. Claxton believed § 87(2)(b) was smoking a marijuana cigarette. There were no other civilians in the area at the time.

PO Bojkovic stopped the vehicle. From the vehicle Sgt. Claxton asked § 87(2)(b) if he knew that smoking in public was illegal. § 87(2)(b) replied that he was in front of his house. Sgt. Claxton exited his vehicle and ordered § 87(2)(b) to extinguish his marijuana cigarette, and told him that he could arrest him for smoking marijuana in public. § 87(2)(b) continued to smoke his marijuana cigarette and said, “I’m in front of my house.” Sgt. Claxton reached forward with his hand and plucked the marijuana cigarette from § 87(2)(b)'s hand. Sgt. Claxton then attempted to handcuff § 87(2)(b) by gripping his left arm. As he did so, Sgt. Claxton burned himself slightly with § 87(2)(b)'s marijuana cigarette, which was still lit; it did not injure Sgt. Claxton. Sgt. Claxton dropped the marijuana cigarette as a result. The marijuana cigarette was later recovered and vouchered (BR 12).

Sgt. Claxton then attempted to place § 87(2)(b) under arrest. Sgt. Claxton did this by attempting to grab § 87(2)(b)'s left arm. As he did so, Sgt. Claxton burned himself with the marijuana cigarette. The burn did not leave an injury; it was "just a sting." Sgt. Claxton then dropped the remainder of the marijuana cigarette onto the ground, which was later recovered and vouchered in support of § 87(2)(b)'s arrest.

Once Sgt. Claxton grabbed for § 87(2)(b) pulled back his arm and attempted to get away from Sgt. Claxton. PO Bojkovic and PO Guerra came to assist Sgt. Claxton by each gripping § 87(2)(b) by his arms. § 87(2)(b) resisted by pulling away and by flailing his arms. In the course of the struggle, Sgt. Claxton fell onto the ground, striking his right knee hard on the ground and causing pain to his right knee cap. § 87(2)(b) then fell on top of Sgt. Claxton. § 87(2)(b) repeatedly said, "I'm in front of my house." Sgt. Claxton did not remember if he issued any commands to § 87(2)(b) at this time. Sgt. Claxton did not remember if PO Bojkovic and PO Guerra issued any instructions at this time. Sgt. Claxton did not remember how § 87(2)(b) was positioned once he was on the ground. Because Sgt. Claxton was in pain from striking his knee on the ground, he did not assist much in the handcuffing of § 87(2)(b). Sgt. Claxton was positioned next to § 87(2)(b) but could not remember if he was closer to his head, legs, or midsection. Sgt. Claxton tried to aid PO Bojkovic and PO Guerra by holding § 87(2)(b) down by pressing one hand on his body. Sgt. Claxton did not see where § 87(2)(b)'s hands were, or exactly how he resisted his arrest, at this time. PO Bojkovic and PO Guerra after a minute or two were able to handcuff § 87(2)(b).

PO Bojkovic (BR 13) was provided testimony that was generally consistent with that of Sgt. Claxton, with the following exceptions: PO Bojkovic said that Sgt. Claxton gripped § 87(2)(b) by his arms. § 87(2)(b) had both of his arms bent at the elbow in front of his body and closed into fists, as though assuming a fighting stance. Sgt. Claxton and § 87(2)(b) pulled back and forth briefly before both Sgt. Claxton and § 87(2)(b) fell to the ground. Both Sgt. Claxton and § 87(2)(b) landed on their sides. Once they landed, Sgt. Claxton began screaming about his knee; PO Bojkovic and PO Guerra then approached and placed § 87(2)(b) who was positioned on his front, into handcuffs. § 87(2)(b) was never lying on his back. PO Bojkovic estimated the entire struggle lasted 45 seconds to a minute. PO Bojkovic never saw PO Guerra punch § 87(2)(b). PO Bojkovic never saw any injuries to § 87(2)(b) or heard him complain of being injured, and had no knowledge of how the injury depicted in the photograph § 87(2)(b) took was sustained.

PO Guerra (BR 14) provided testimony that was consistent with that of Sgt. Claxton and PO Bojkovic, with the following exceptions: PO Guerra said that Sgt. Claxton first ordered § 87(2)(b) to put his hands behind his back, and that when § 87(2)(b) refused, Sgt. Claxton and PO Bojkovic each gripped one of § 87(2)(b)'s wrists. § 87(2)(b) resisted by flailing his arms and pulling away from officers, at which time he was brought onto the ground. Once on the ground, § 87(2)(b) was positioned on his stomach with his hands tucked beneath his body. § 87(2)(b) resisted by kicking his legs. PO Guerra and PO Bojkovic each pulled at one of § 87(2)(b)'s wrists until his hands were pulled out from beneath his body and § 87(2)(b) was handcuffed. Sgt. Claxton and PO Bojkovic then lifted § 87(2)(b) and began escorting him to the police vehicle, at which time § 87(2)(b) began to pull away and shift his body from side to side. Sgt. Claxton and PO Bojkovic brought § 87(2)(b) onto the ground, where § 87(2)(b) was positioned on his back. § 87(2)(b) continued to resist by shifting his body around and kicking his legs. PO Guerra heard Sgt. Claxton yelling at this point, "My knee, my knee," which led him to believe that Sgt. Claxton had injured his knee. PO Guerra then positioned himself atop § 87(2)(b).

§ 87(2)(b) and held him against the ground by his shoulders until § 87(2)(b) eventually stopped writhing of his own accord. § 87(2)(b) was then escorted to the police vehicle. PO Guerra never observed any injury to § 87(2)(b) and had no knowledge of how the black eye depicted in the photograph § 87(2)(b) took was sustained.

Curtilage is generally defined as an area that is related to the intimate activities of the home and is entitled to constitutional protection. Four factors are used to determine whether the area in issue is intimately tied to the home: the proximity of the area searched to a home, whether the area is included within an enclosure surrounding the home, the use to which the area is put, and the visibility of the area to the public. People v. Reilly, 195 A.D.2d 95 (1994) (BR 15) In People v. Versaggi, 296 A.D.2d 429 (2002) (BR 16), the court found that officers who walked up a defendant's driveway and observed marijuana plants growing on his property in plain view did not violate the defendant's right to privacy, as there was no evidence that the defendant intended to exclude the public from his driveway. A person is guilty of criminal possession of marijuana in the fifth degree when he knowingly and unlawfully possesses marijuana in a public place, and such marijuana is burning or open to public view. NY Penal Law § 221.10 (BR 17)

Officers must use the minimum level of physical force necessary to effect an arrest.  
Patrol Guide 203-11 (BR 18)

[illegible]

§ 87(2)(g)

**Allegation E – Discourtesy: Sergeant Sean Claxton spoke discourteously to § 87(2)(b)**

§ 87(2)(b) alleged that in the police vehicle en route back to the 67<sup>th</sup> Precinct stationhouse, Sgt. Claxton told him, “You think you’re a smartass. We’re going to throw the book at you.”

Sgt. Claxton denied saying, “You think you’re a smartass. We’re going to throw the book at you.” Sgt. Claxton denied calling § 87(2)(b) a “smartass,” or otherwise using profanity towards him. Sgt. Claxton thought it possible that he used some profanity during this incident; Sgt. Claxton could not remember specifically what he said, but the profanity that he used was directed towards the pain in his knee, not towards § 87(2)(b) and he never used the word “smartass” specifically.

PO Guerra and PO Bojkovic both denied hearing Sgt. Claxton say, “You think you’re a smartass. We’re going to throw the book at you,” to § 87(2)(b)

§ 87(2)(g)

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Squad:

Investigator: \_\_\_\_\_  
Signature Print Date

Squad Leader: \_\_\_\_\_  
Title/Signature Print Date

Reviewer: \_\_\_\_\_  
Title/Signature Print Date